Supreme Court, U.S
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. **79-1643**

MARGARET E. BOSCO, Petitioner

v.

ECKARDT C. BECK, Region II Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS COSTLE, as Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY, JERRY ENGLISH, as Commissioner, N.J. DEPARTMENT OF ENVIRONMENTAL PROTECTION, PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) and TOWN OF BELVIDERE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARGARET E. BOSCO
167R Washington Street
Belvidere, New Jersey
201-475-2715 07823
Petitioner pro se

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CITATIONS

63 Har. Law Rev. 5-13 1949

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Ethics Manual For House of Representatives Chap. 4 Hse Doc. 96-134

CASES CITED

Shiffler supra 548 F. 2d 104 n.5

N.A.A.C.P. v. Medical Center, 584 F. 2d 619, 635 n. 19

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CASES Cited

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

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v.

ECKARDT C. BECK, ET AL, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Margaret E. Bosco respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 18, 1980, affirming the Decision of the U.S.D.C., August 30, 1979.

OPINION BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto, App. A. The Opinion of the U.S.D.C. for New Jersey also appears in the Appendix hereto, App.B.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 18, 1980. A timely petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and R. 19(1)(b), and R. 22(3).

QUESTIONS PRESENTED

1. Whether the Order of the United States District Court for New Jersey was erroneous because it was based on applying the wrong standard of review in that it used the relatively low standard of "arbitrary and capricious" rather than that of "reasonableness".

2. Whether, in assuming that "arbitray and capricious" standard of review was the proper one, the decision of the U.S.D.C. not to require an Environmental Impact Statement was supported by the evidence.

3. Whether the decision of the Court was in error by its failure to take into consideration the relevant contributory factors of the 'arm-twisting' by fact of political intervention and alleged conflict-of-interests of special federal

government employee and other associates of the Pequest River Municipal Utilities Authority and Town of Belvidere, as applicants, in violation of federal statutes and codes of ethics; bringing undue pressure on government agency and affecting the decision-making in formal administrative process.

4. Whether the decision of the Court was in error by its failure to take into consideration the alleged pattern of 'arm-twisting' which would increase the likelihood of partiality, arbitrariness and error in the administrative decision not to have an EIS to such an extent as to deprive petitioner and other citizens of their right to a fair and impartial hearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C. 42 § 4321 et seq.
U.S.C. 42 § 4332 et seq.
U.S.C. 18 § 201
U.S.C. 18 205
U.S.C. 18 § 434
Constitutional Amendment 14
United States Sup. Crt. Dig. Vol. 5A Constitutional Law, Supp. 1979

OTHER REFERENCES

63 Har. Law Rev. 5-13 1949

Davis Administrative Law §1.02

Ethics Manual For The Members And Employees of The House of Representatives Chapter 4. Documant No. 96-134, 96th Cong. First Session

CASES CITED

Shiffler supra 548 F. 2d 104 n.5

N.A.A.C.P. v. Medical Center, 584 F 2d 619, 635 n.19

Kleppe 427 U.S. at 412

Citizens to Preserve Overton Park v. Volpe, 402 U.S. (1971)

Duquesne Light Co. v. EPA, 522 F. 2d 1186, 1192-92 (3d Cir. 1975)

Buck Hill Falls v. Grant 388 F. Supp. 394 (1975), 537 F. 2d 29 (1976), 388 F. Supp. 398

Hanly v. Kleindienst 471 F. 2d 823 (2d Cir. 1972)

Wyoming Outdoor Coordinating Council v.Butz 484 F. 2d 1244 (10th Cir. 1973)

Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8th Cir.1974)

Sierra Club v. Froehlke, 534 F. 2d 1289

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First National Bank of Chicago v.Rishardson 484, F. 2d 1369, 1381 (7th Cir.1973)

Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650

U.S. v. Miss. Valley Gen. Co., 5 L. Ed 268

E. Stanley v. Ill., 92 S. Ct. 1208, 405 U.S. 645, 31 L. Ed 2d 551 U.S.ILL.(1972)

-STATEMENT OF THE CASE

The basis for the instant case stems from the failure, and refusal, of the Environmental Protection Agency (hereinafter referred to as EPA) to prepare and issue the necessary Environmental Impact Statement (EIS) within the meaning of the National Environmental Policy Act (NEPA) of 1969, and their own rules and regulations pursuant to U.S.C. 42 § 4321 et seq. and U.S.C. 42 § 4332 et seq., prior to final approval of federal funding, in the amount of $2,866,732.00 for regional sewerage treatment facility construction, and $1,800,929.00 for the town of Belvidere collection system. EPA approval for federal funding represents 75% of the cost.

The cost continues to change, adding ever-increasing adverse economic impact to the already overburdened taxpayer and resident; costs that were never explained to the public.

The original feasibility study area encompassed approximately 70 sq. mls., including the towns of Belvidere and Oxford and Hope, and portions of the

townships of White, Knowlton, Mansfield, Frelingheysen, Blairstown and part of Washington; in the County of Warren.

When the Authority re-organized in May, 1978, all towns and townships withdrew as participants of the authority, with the exception of Belvidere and Oxford, with a total area remaining of less than 7 sq. mls. (each with separate planned sewerage treatment facility and collection system); and White Township, with an area of approximately 18 sq. mls., mostly rural, to be divided-up between the Belvidere and Oxford sewerage facilities. Project design size remains the same as for the original area.

In August, 1978, after learning that the with-drawal 'deadline' had passed, White Township residents held a mass meeting with township officials to protest their inclusion as participants in the sewerage projects and demanded that township officials "get them out".

At said meeting it was learned that Notification of withdrawal date was not brought to the attention of all members due to a family emergency of one of the officials who also serves on the Pequest River MU Authority.

Members of the PRMUA include:

(1) John King, (now) former White Township official and member of the PRMUA; a Banker by profession.

(2) Henry Monetti, resident of Mansfield Township; Real Estate Broker by profession.

(3)Thomas Planer resident of Hope; Insurance Executive by profession,

(4) Leonard Becker, Mayor of Oxford; fuel oil company maintenance personnel,

(5) Irene Smith Mayor of Belvidere and former Special Federal Government Employee as District Staff Aide to former Congresswoman Helen Meyner.

After PRMUA ignored repeated requests to meet with the White Township Planning Board (relevant to the Master Plan of the Township and the fact that the Belvidere Treatment Plant would be located in White), citizens organization CASE (Citizens Against Sewer Encroachment) , residents of Belvidere and Oxford held another mass meeting in the Warren County Courthouse

on October 25, 1978, to co-incide with PRMUA meeting, whose members attended very reluctantly, after strong insistance of those in attendance at the meeting.

After lengthy and heated debate, White was granted permission to withdraw from the authority---only to have this rescinded at a later date by then Commissioner O'Hern.

At that meeting, a letter was read--from Eckardt Beck--stating that final approval of the projects had been granted; omitting any reference to the Negative Declaration that had been issued September 8, 1978, or the comment limitation (already ended).

Petitioner and other citizens attended Authority meetings and Town Council meetings requesting information relevant to proposed costs to residents, adverse impact to the environment, etc.; continually receiving the answer that "its too early for any answers". After final approval of federal funding by EPA, the answers changed to "it's too late, where were you earlier?" (Approval, Nov., 1978.

No mention was made of the political intervention being conducted (verified

in affidavit of Irene Smith, spec. fed. gov't. employee and chairperson of the PRMUA).

Petitioner and others continued to communicate, by phone and in writing, with offices and officials of EPA and DEP, requesting further study of the proposed projects and the adverse impacts of same, as well as requesting that alternatives be considered. EPA inter-agency letters attest to the fact that large regional sewage systems are too costly for residents in small towns and rural areas with populations of less than 10,000. See A.R. #1-#31, communications to agencies. These have not been referred to in any of respondents' briefs to the lower Courts. Offices of Attorney General and Public Advocate were contacted to look into the possibility of conflict-of-interest of chairperson of PRMUA, attorney serving 'authority' and county.

Finally on February 15, 1979, capitulating to continued pressure by petitioner, CASE members and others, EPA scheduled a public meeting in the Courthouse in Belvidere; making it very clear that this was <u>not</u> a public hearing.

When announcing the impending meeting at the January PRMUA meeting, chairperson of 'authority' stated that:

> "this meeting is being held only to 'straighten out' the 'loyal opposition'.

On February 16, 1979, White Township received the 'news' that Commissioner O'Hern had denied permission to withdraw from the Authority; with the added information that if they continued to pursue this course, and should they be successful in so doing, they would jeopardize for any future time, any privilege of applying for federal funding for any disposal system problem, should the problem arise.

In March, 1979, EPA issued the 'answer' to the Feb. 15 meeting, in the form of a lengthy letter affirming earlier approval of the projects and funding.

Also in March, 1979, petitioner, and others, learned for the first time of the existence of the Negative Declaration and requested same from EPA.

On June 13, 1979, petitioner in this case filed in the U.S.District Court in Newark, N.J., a verified complaint to

declare invalid and enjoin defendants' actions in approving and planning to ptoceed with the known projects for PRMUA and Town of Belvidere, despite no EIS by EPA.

June 27, 1979, petitioner filed notice of motion for Preliminary Injunction, with supporting memorandum of law, in United States District Court; with affidavit of service to all parties.

(Case transferred from Newark to Trenton, New Jersey: Assigned to Judge George Barlow).

August 1, 1979, answer of defendant O'Hern filed, with motion for summary judgment, returnable August 21, 1979.

August 6, 1979, defendant Town of Belvidere filed answer.

August 10, 1979, petitioner filed reply brief to counterclaim;and notice of motion for consolidation of hearing on preliminar injunction.

August 13, 1979, federal defendants filed notice of motion for summary judgment, returnable August 21, 1979.

August 20, 1979, answer of defendant PRMUA filed; also affidavit of Irene Smith and Roy Elam filed.

August 21, 1979, prior to hearing, in U.S.Federal Building in Trenton, Alias Summons served to PRMUA; on fifth attempt.

August 21, 1979, Civil No. 79-1865, Hearing in U.S.District Court in Trenton; Judge Clarkson S. Fisher presiding.

August 30, 1979, Opinion with Judgment and Order handed down; denying plaintiff's application for injunctive relief and dismissing complaint with costs in favor of defendants Eckardt C. Beck, Douglas Costle, Daniel)'Hern, PRMUA and Town of Belvidere against plaintiff Margaret E. Bosco.

September 12, 1979, plaintiff became the appellant in filing Notice of Appeal to the U.S.Court of Appeals for the Third Circuit.

October 18, 1979, brief filed in support of appeal, in office of clerk of the Court of Appeals, Philadelphia, Pa.

December 12, 1979, petitioner, then appellant, filed Reply Brief to counterclaim by appellees.

January 8, 1980, case, No. 79-2300, submitted on Briefs under Rule 12(6), before Judges Rosenn, Weis and Garth.

January 18, 1980, Ordered that the Judgment of the U.S.D.C. be affirmed, each side bearing their own costs.

The question of the propriety of bringing undue pressure in the form of political intervention on the decision-making in a formal administrative process is a substantial one to be treated by this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT IN THAT THE APPLICATION OF IT WAS BASED ON THE WRONG STANDARD OF REVIEW SINCE IT USED THE RELATIVELY LOW STANDARD OF "ARBITRARY AND CAPRICIOUS" RATHER THAN THAT OF "REASONABLENESS".

On page 11, para. 2 of the Order it states:

> "The Court of Appeals for the Third Circuit has not expresses a clear preference for either standard of review. It has raised the issue and declined to decide it numerous times. See, e.g., Shiffler, supra, 548 F. 2d 104, n.5; N.A.A.C.P. v. Medical Center, 584 F. 2d 619, 635 n. 19. I therefore will not deviate from my prior decision to apply the arbitrary and capricious standard to review challenged agency actions under NEPA. See also Kleppe, supra, 427 U.S. at 412; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Duquesne Light Co. v. EPA, 522 F. 2d 1186, 1192-93 (3d Cir. 1975). I must therefore review the administrative record upon which EPA based its decision in order to insure that there was a sound basis for the decision and that it was not arbitrary and capricious".

But if the Third Circuit has not expressed a clear preference for either standard of review it certainly seemed to show a leaning in favor of the "reasonableness" standard in the Buck Hill Falls case (Concerned Citizens, etc.), 388 F. Supp. 394 (1975), vacated in part in 537 F. 2d 29 (1976). At 388 F. Supp. 398 the COurt states:

> "The Court is aware of authority in the Second Circuit holding that an agency decision not to file an environmental impact statement should be overturned only if it is arbitrary and capricious." Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir.1972), cert. denied 412 U.S. 908, 93 S. Ct. 2290, 36 L. Ed 2d 974 (1972). We think the beter view is set forth in Judge Friendly's dissent in that case and in Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 (10th Cir.1973) and Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8th Cir.1974).

At 409 it states:

> "The standard to be employed by the Court in reviewing whether Plaintiffs can probably show that Defendants violated the law in approving the project without preparing an impact statement is one of reasonableness, i.e., were Defendants

> reasonable in concluding that the Buck Hill Falls Dam and Impoundment did not require preparation of an EIS".

Since on review the case was vacated in part by the Third Circuit, (537 F. 2d 29 1976), but did not disturb the requirement that an EIS be prepared, than by implication it affirmed the standard of review used which was the higher one of reasonableness.

A close inspection of the cases cited in other circuits in support of the more lenient"arbitrary and capricious" standard show, in Sierra Club v. Froehlke, 534 F. 2d 1289 that the Court states at 1305:

> "The standard of review to be applied here and in other similar cases is set forth in Citizens to Preserve Overton Park v. Volpo, supra, 401 U.S. at 416, 91 S. Ct. at 824. The reviewing court must first determine whether the agency acted within the scipe of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In making the latter determination the court must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment".
>
> (underline added)

Adding that:

> "We have reviewed with care the evidence submitted and we find no clear error in the determination made".

From the above it would seem to indicate that, although the court stated that the standard of review to be used included "arbitrary and capricious", it actually made its decision on the basis of a careful review of the evidence submitted and the finding of "no clear error in the detmination made". So, in fact, the court went further than determining on the sole basis of "arbitrary and capricious".

In Nucleus of Chicago Home Owners v. Lynn, 524 F. 2d 225 (7th Cir.1975), it states at 229:

> "As an initial matter, we note that the parties agree that HUD's determination that an environmentl impact statement need not be filed must stand unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. First National Bank of Chicago v. Richardson, 484 F. 2d 1369, 1381 (7th Cir. 1973)".

This case was decided on the basis of "arbitrary and capricious" standard, but the facts show that it was "...another episode in the continuing dispute over

the location of public housing in the Chicago Metropolitan area". From these facts it's obvious that it represented a minimum of environmental impact on the community at large because what difference would it make except socially or economically in a big city. This distinguished it from the instant case.

Also on page 11 in Hanly v. Kleindienst 471 F. 2d 823 (2d Cir.1972) case it was not unamimous on the question of which standard to be used with Judge Friendly making a strong dissent...,, and This is another case where a public building was proposed in the lower Manhattan area of New York City, in place of a building already existing and so it would appear that the environmental impact of the construction would be minimal as compared to the sociologic aspect as was stated in the suit.

And in the Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp.650, although the court stated at 653:

> "In the absence of a specific directive from this circuit, the court concludes that the "arbitrary or capricious" standard is appropriate in this case".

It also stated at 659:

> "Given the record before the EPA, these findings were hardly arbitrary, capricious, or an abuse of discretion. Indeed, EPA's decision to issue a negative declaration appears more than reasonable and there is a reasonable basis in the record for EPA's key findings".

So that it was saying in effect that the "reasonableness" factor was also taken into consideration.

On page 10 of the Order it states as follows:

> "There is, however, a conflict among circuits, and even among the judges of this District, as to the appropriate standard of review which I must apply. In some circuits, EPA, or any other agency subject to NEPA, is held to the relatively high standard of "reasonableness". E.g. Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8TH Cir. 1974) (en banc); Texas Committee on Natural Resources v. Berglund, 573 F. 2d 201(5th Circuit 1978); City of Davis v. Coleman, 521 F. 2d 661 (9th Cir. 1975); Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 (10th Cir.1973); International Harvester Co. v. Ruckelshaus, 478 F. 2d 615 (D.C.Cir. 1973). Under this standard plaintiff need only show that EPA's decision was unreasonable to prevail in this action.
> (underline added)

Petitioner contends that the more formidable arguments are to be found in the cases in favor of the "reasonable" standard cited above on Pg. 10 of the Order. The arguments for that standard are summarized in one of them, Wyoming Outdoors Coordinating Council v. Butz, 484 F. 2d 1244 (10th Cir.1973) at 1249:

> "We are persuaded that the general reference to discretion in § 706(2)(A) of the Administrative Procedure Act, although applicable to some other reviewable administrative decisions, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed 2d 136, does not apply here to the agency's determination under NEPA. Under the specific terms of NEPA we feel that the proper standard, as stated earlier, is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute so as to be "in accordance with law"— another ground of review in § 706 (2)(A) which may be applied consistently with the procedural demands of NEPA."

For the above reasons petitioner contends that the District Court applied the wrong standard of review in using the "arbitrary and capricious" standard.

2. ASSUMING THAT THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW WAS THE PROPER ONE, THE DECISION OF THE DISTRICT COURT NOT TO REQUIRE AN EIS WAS ERRONEOUS IN THAT IT WAS NOT SUPPORTED BY THE EVIDENCE.

The Order of the Court on page 5 states:

> "the EPA must also comply with the provisions of NEPA. NEPA was passed a decade ago for the stated purpose of encouraging a "productive and enjoyable harmony between man and his enviroment" and promoting "effort which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man..." 42 U.S.C. § 4321. To effect that purpose NEPA commands "all agencies of the Federal Government to :
>
> (C) include in every recommendation or report on proposals for legislation and <u>other major Federal actions</u> significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented".

42 U.S.C. § 4332 (2)(C).

As to the question of whether the instant case involves a major federal action, the Opinion states clearly on pg. 16:

> "I agree with plaintiff and must conclude that these projects do constitute major federal actions".

On pg. 17, stating:

> "Plaintiff's complaint comes closer to the mark when she points to the contradictory statements contained in the EIA with regard to odors produced by the treatment plant and their impact on Belvidere's residents. At. page 3 the EIA admits that odors will be produced at the treatment facility, but concludes that "(s)ince there are no communities near the plant site the adverse effect of odors on residents in (sic) non-existent". At page 4, however, the EIA states that the (n)oise produced by the sewage treatment plant will affet residential areas to some extent because of the location of homes in the immediate area". And, finally, at page 5 the EIAagain refers to odors, this time concluding that "(a)s there are houses adjacent to the treatment plant site (odors) may be a problem in the absence of screening vegetation to reduce the wind velocity at the plant site".

> "Needless to say, this is an indication of sloppy draftsmanship".

Petitioner respectfully disagrees with the conclusion of the Court below in characterizing the contradictions made by the agency concerning major environmental impacts to the adjacent residents as 'sloppy draftsmanship'. It is petitioner's contention that the question raised by the admitted contradiction is one of fact and not of writing. Are there residents in the area who will be affected by the odors and noise---or not? Any conclusion by the agency that they are not there when they are-- is clearly arbitrary and capricious.

(underline added)

Petitioner respectfully contends that the decision of the Court below condones non-compliance with the mandate in NEPA as intended by Congress, See opinion (and order) page 5:

> "the EPA must comply with the provisions of NEPA...promoting "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man..... 42 U.S.C. § 4321...".

and by this contradiction of the meaning of NEPA allows for creating damage to the environment as a prerogative of discretionary decision-making.

3. THE COURT BELOW "IMPROPERLY" SANCTIONED THE SIGNIFICANT RELEVANT FACTORS OF CONFLICT-OF-INTERESTS OF SPECIAL FEDERAL GOVERNMENT EMPLOYEE AND SEVERAL INDIVIDUALS AT ALL LEVELS OF THE APPLICATION PROCESS.

U.S.C. Title 18 §§ 201 under Exec. Order No 11222, May 8, 1965, 30 F.R. 6469, at STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES, Part I-Policy in Section 101 states:

> "Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity o of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions".

In Part II-STANDARDS OF CONDUCT, Sec. 101(c):

> "It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a) which might result in, or create appearance of--
>
> (3) impeding government efficiency or economy;
>
> (4) losing complete independence or impartiality of action;
>
> (5) making a government decision outside official channels; or
>
> (6) affecting adversely the confidence of the public in the integrity of the Government".

In United States v. Mississippi Valley Gen. Co., 5 L Ed 2d 268 at § 2., "Construction and purpose of statute":"consent of superiors":

> "Like other conflict-in-interest statutes, 18 U.S.C. § 434 is designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public.....The statute is designed to protect the United States, as a government, from the mistakes, as well as the connivance, of its own officers and agents";

thus recognizing the human frailties of those in government positions as being just that, albeit sometimes in a more vulnerable position than desired.

Chapter 4 of House Document No. 96-134, ETHICS MANUAL FOR MEMBERS AND EMPLOYEES OF THE HOUSE OF REPRESENTATIVES states on Page 30:

> ". ..congressional staffers may not represent persons in a private capacity before the Government or in court concerning a matter affecting the United States, but may engage in such representational activities only in connection with performing and fulfilling official congressional duties. In addition to specific statutory proscriptions, ethical standard and guidelines

> exist concerning the permissible scope of such activities to prevent abuses of office and to prevent undue or improper influence or pressure upon administrative process".

On page 32 at Prohibited Ex Parte Communications it states:

> "The "Government Sunshine Act" enacted in 1976 contains a provision which prohibits in certain circumstances "ex parte communications" with administrative agencies. Ex parte communications are oral or written communications made without proper notice to all parties and not on the public record, from an interested person outside of the agency to a member of the agency, an administrative judge, or to an employee involved in the decision-making process..."
>
> (underline added)

It is just this action on the part of the special federal government employee, as evidenced in Affidavit of said employee, that implies that "undue pressure and political intervention" on the decision-making of a formal administrative agency process". (App. C)

In the Opinion of the Court on page 20:

> "At oral argument plaintiff referred numerous times to alleged conflicts-of-interests on the part of an individual who was both mayor of Belvidere, the chairperson of the PRMUA, and a former staff member of former Congresswoman Helen Meyner.

> Although, if proven, there might be some basis for complaint under state law 40:69A-163... these allegations have no bearing upon the question which I am called upon to decide, whether EPA properly concluded that an EIS was not required",

the Court continues with:

> "I recognize that fairly strong legal arguments can be made for the application of the reasonable standard".

The Record of the Court below at oral argument will show that petitioner did point out appearances of conflict-of-interests on the part of several individuals associates with the application process of the PRMUA and town of Belvidere:

(1) Chairperson of the PRMUA, special federal government employee; also serves as mayor of Belvidere;

(2) Attorney for PRMUA serves concurrently as Prosecutor for Warren County in apparent disregard for Opinion 415, that appears to discourage this type of action in order to avoid the appearance of conflict-of-interest in the same vein as that proscribed inU.S.C 18 §§ 201 on page 274 under PartI and Part II of "Standards of Conduct for Govern ment Employees and Officers" wherein it states:

> "Where government is based on the

> consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government..."

(3) Former Councilman resigned from his elective post to accept position with PRMUA, after having advocated and voted for sewage projects.

(4) Chairman of Belvidere Planning Board (now state employee) was employed by PRMUA while under suspension as inspector with Warren County Health Board.

(5) Engineer serves both PRMUA and town collection system, though this is a practise of strong concern to the State Board of Professional Engineers and Land Surveyors.

4. THE PATTERN OF "ARM-TWISTING" INCREASED THE LIKELIHOOD OF PARTIALITY TO SUCH AN EXTENT AS TO DEPRIVE PETITIONER AND OTHER CITIZENS OF THE RIGHT TO HAVE CONFIDENCE IN THE INTEGRITY OF GOVERNMENT OFFICIALS AND AGENCIES AND PRE-DESTINED APPROVAL OF FEDERAL FUNDING FOR MAJOR FEDERAL ACTIONS WITHOUT PREPARATION OF AN "EIS" BY THE EPA.

Petitioner respectfully believes that the Judge's failure to "get at the facts" as they relate to the merits of the case, defeats the very purpose of judicial review in the due process of law;

and refers to 63 Har. Law Rev. wherein is stated:

> "The Chief* had several purposes in going into the merits of a case on petition for certiorari or the jurisdictional statement. First, He was interested in preventing grave mis-carriages of justice, and occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong".

The instant case is of public importance in that the EPA, a Government agency, granted the approval of federal funds for major federal actions without the preparation of an EIS in the interest of the human environment.

Page 16 of the Opinion states in agreement:

> "I agree with plaintiff and must conclude that these projects do constitute major federal actions".

In United States Supreme Court Digest, Vol 5A, Constitutional Law, Supp. 1979 at 251 and Constitutional Guarantees in General, U.S.C.A. Constitutional Amend.14; E. Stanley v. ILL., 92 S. Ct 1208, 405 U.S 645, 31 L. Ed 2d 551, U.S. ILL, 1972:

> "The Constitution recognizes higher values than speed and

---

* Reference to Chief Justice Hughes (underline added)

> efficiency; the Bill of Rights in general, and the due process clause in particular, were disigned to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more than mediocre ones".

It is noted in Sup. Court Practise, Stern & Gressman, 5th Ed., in Chap.4, "Factors Motivating the Exercise of Jurisdiction", at 4:18, Erroneousness of Decisions below, on pg. 298, that:

> "But on occasion the Court does accept a case for review for no apparent reason other than error in the lower court's decision, and it does so even though there seems to be no conflicting decisions, no novel or important principles of law and no elements of great public interest at stake. It is enough that four or more Justices are so doubtful of the correctness of the decision below that they desire further consideration of the case. They may be motivated by a feeling that the decision represents a gross miscarriage of justice or a subtle errosion of a statutory or legal principle".

See, supra, 63 Har. Law Rev. concerning the "several purposes of going into the merits of a case"; coupled with and appearing on the same page at supra:

> "The Constitution recognizes higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of vulnerable citizenry..;

each recognizing that which is addressed in Davis Administrative Law Text at § 1.02, 'The Place of Administrative Action in Our Governmental and Legal Systems' wherein is stated:

> "Mr. Justice Jackson asserted in a formal opinion in 1952: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart";

continuing infra with:

> "Mr. Justice Frankfurter in 1957 wrote of the Supreme Court's work:"Review of administrative action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits". Constitutional Law, including "cases with constitutional under tones" was in second place, with less than one-fourth of the cases ....But the administrative process affects nearly every one in many ways nearly every day....";

the Justice expressed the effects of

administrative discretionary actions of the fragile values of vulnerable citizenry.

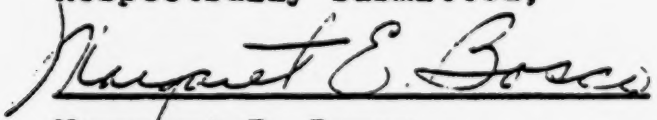
The correctness of the decision below raises a substantial question of the propriety of undue pressure and political intervention in the decision-making of a formal administrative process.

The refusal of the Third Circuit to respect the facts that pre-destined EPA approval of federal funds for major federal projects in the absence of an EIS cannot be justified.

CONCLUSION

For these reasons, and because the questions raised are substantial and need the exercise of this Court that exists as a safeguard to "liberty And Justice For All" as expressed in our Pledge of Allegiance, and guaranteed in the Constitution and the Bill of Rights, petitioner has filed for a writ of certiorari to review the judgment and opinion of the Court below.

Respectfully submitted,



Margaret E. Bosco
167B Washington Street
Belvidere, New Jersey 07823
Petitioner pro se

Dated:
April 11, 1980 .

In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No._____

AFFIDAVIT OF SERVICE

MARGARET E. BOSCO

Petitioner,

v.

ECKARDT C. BECK, Region II Administrator, U.S.Environmental Protection Agency, DOUGLAS COSTLE, as Administrator, U.S.Environmental Protection Agency, JERRY ENGLISH, Commissioner, N.J. Department of Environmental Protection, PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY(WARREN COUNTY) and TOWN of BELVIDERE,

Respondents.

Margaret E. Bosco, of full age, being duly sworn according to law upon her oath deposes and says:

1. I am the Petitioner in the above-entitled case.

2. On the 14 day of April, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; Thomas H. Pacheco, Esq., Land and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530; Dennis J. Krumholz,

Office of the Attorney General, State of New Jersey, 36 W. State Street, Trenton, New Jersey 08625; Louis J. Bizzari, Esq. Assistant United States Attorney 402 E. State Street, Trenton, New Jersey 08605; I further certify that three copies of the same were delivered to the offices of James A. Tirrell, Esq., Corliss Avenue and Warren Street, Phillipsburg, New Jersey 08865; and William R. Albrecht, Esq., Schenck, Price, Smith and King, 416 Front Street, Belvidere, New Jersey 07823.

Margaret E. Bosco

Margaret E. Bosco
167R Washington Street
Belvidere, New Jersey 07823
Petitioner pro se

Sworn and subscribed to
before me, this 16
day of April, 1979

Jean B. Carlucci

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 8, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2300

MARGARET E. BOSCO
Appellant
v.
ECKARDT C. BECK, as Region II Administrator, U.S.ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS COSTLE, as Administrator, U.S.ENVIRONMENTAL PROTECTION AGENCY, DANIEL O'HERN, Commissioner, N.J.DEPARTMENT ENVIRONMENTAL PROTECTION,PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (Warren County), and TOWN OF BELVIDERE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 79-1865

Submitted Under Rule 12(6) January 8,1980

Before: ROSENN, WEIS, and GARTH, CIRCUIT JUDGES

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is,

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear their own costs.

BY THE COURT

MAX ROSENN
Circuit Judge

Dated: Jan 18, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 79-1865
Judge Clarkson S. Fisher

MARGARET E. BOSCO, Plaintiff

v.

ECKARDT C. BECK, Region II Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS COSTLE COSTLE, Administrator, U.S. ENVIRONMENTAL PROTECTIONAGENCY, JERRY ENGLISH, Commissioner, N.J. DEPARTMENT OF ENVIRONMENTAL PROTECTION, PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY(WARREN COUNTY) and TOWN OF BELVIDERE
Defendants.

ORDER AND JUDGMENT FILED August 30, 1979

This action having been tried to the Court without a jury, the trial on the merits having been advanced and consolidated with the hearing on plaintiff's application for preliminary injunctive relief with the consent of the parties under Fed.R.Civ.P.65(a)(2); and

The Court having reviewed the administrative record, all testimony and other evidence together with the briefs and oral argument of counsel; and

The Court having decided for the reasons set forth in its opinion of August 30,1979 that the plaintiff's causes for injunctive

relief under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., should be denied;

IT IS, this 30th day of August, 1979, hereby ORDERED:

(1) That plaintiff's application for injunctive relief is denied and her complaint dismissed; and

(2) All other motions presently pending before the Court are denied.

Clarkson S. Fisher
Chief Judge

NOT TO BE PUBLISHED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARGARET E. BOSCO Plaintiff v.	:Civil Action :No.79-1865
ECKARDT C. BECK, Region II Administrator, U.S.ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS COSTLE,Administrator,U.S.ENVIRONMENTAL PROTECTION AGENCYJERRY ENGLISH, Commissioner, N.J.DEPARTMENT OF ENVIRONMENTAL PROTECTION;PEQUEST RIVER MUNICIPAL UTILITIES(WARREN COUNTY) and TOWN OF BELVIDERE, Defendants.	:OPINION :FILED August 30,1979

CLARKSON S. FISHER,Chief Judge

Appearances:

Margaret E. Bosco
167R Washington Street
Belvidere, New Jersey 07823
Plaintiff pro se

Louis J. Bizzari,Esq.
Assistant United States Attorney
Federal Building
402 East State Street
Trenton, New Jersey, 08605
(Attorney for Defendants
Costle and Beck)

Dennis J. Krumholz,Esq.
Deputy Attorney General
State of New Jersey
36 West State Street
Trenton, New Jersey 08625
(Attorney for Defendant English)

Appearances: cont'd

James A. Tirrell,Esq.
Corliss & Warren Street
Phillipsburg, New Jersey 08865

William R. Albrecht,Esq.
Schenck, Price, Smith & King
P.O.Box #133
Belvidere, New Jersey 07823

Plaintiff Margaret E. Bosco brings this action under the National Environmental Policy Act of 1969(hereinafter "NEPA"),42U.S.C. §4321 et seq., seeking injunctive relief restraining the defendants from proceeding with plans to build sewerage collection and treatment facilities in and around Belvidere, New Jersey, until an Environmental Impact Statement(hereinafter "EIS") had been prepared. Plaintiff contends that an EIS is required by NEPA § 102(2)(C), 42 U.S.C.§ 4332(2)(C), because the construction of the sewerage facilities would be a major federal action significantly affecting the quality of the human environment.

1. BACKGROUND

The Parties: Plaintiff Margaret E. Bosco is a resident of the Town of Belvidere and the owner of property within the area to be served by the proposed

sewerage projects. Plaintiff claims a direct and adverse effect upon her personal and property rights as a result of the construction of these projects. Plaintiff's standing to bring this challenge has not been questioned by the defendants.

The defendant Eckardt C. Beck is the Regional Administrator of Region II of the Environmental Protection Agency. Douglas M. Costle is the National Administrator of EPA. Beck and Costle are collectively referred to as the federal defendants. Jerry English is the Commissioner of the New Jersey Department of Environmental Protection(hereinafter "DEP"). The Warren County-Pequest River Municipal Utilities Authority(hereinafter "PRMUA") is the agency responsible for wastewater management in the drainage basin of the Pequest River and its tributaries in Warren County.

(end of pg.2 of the Opinion)

beg. pg.-3-

New Jersey. It is the agency designated to administer the actual planning, design, construction and operation of these projects. The PRMUA was formerly known as the as the Warren County-Pequest River Sewerage Authority. The final defendant,

the Town of Belvidere, is the local municipality which will be served by the sewerage treatment and collection system. Each of the defendants has appeared and retained separate counsel.

The Projects: The projects which plaintiff seeks to halt were developed jointly by the PRMUA, DEP and Town of Belvidere and are to be 75% funded by the federal government. New Jersey is to fund 8% of the projects and the remainder is to be borrowed. The first project is the construction of a wastewater treatment plant in White Township, to be maintained by the PRMUA. The PRMUA applied for federal financial assistance on November 5, 1977. The application was approved and Grant No. C-34-454-02 in the amount of $2,851,252.00 was awarded on September 29, 1978. The second project is the construction of a wastewater collection system in the Town of Belvidere which will transfer Belvidere sewerage to the PRMUA treatment facility. The application for funds to build the collection system was filed by the Town of Belvidere on September 19, 1977, and on September 29, 1978, the EPA approved Grant No. C-34-513-01 in the amount of $1,804,435.00.

The Proceedings in this Court:
August 21, 1979, was the return date of plaintiff's application for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a). Also returnable on that date were cross-motions for summary judgment, Fed.R.Civ.P.56, filed by both the federal defendants and the DEP. In addition, with the consent of all parties, I ordered the trial of this action on the merits advanced and consolidated with the hearing on plaintiff's application for a preliminary injunction. Fed.R.Civ.P.65(a)(2). This (end pg.3)

(beg.pg.4)
opinion therefore finally resolves this controversy and constitutes my conclusions of law and findings of fact. Fed.R.Civ.P.52.

II. THE STATUTORY FRAMEWORK

The Federal Water Pollution Control Act (hereinafter referred the "Clean Water Act"), 33 U.S.C. § 1252 et seq., as amended, established an EPA grant program under which federal funds may be used to finance the construction of publicly owned sewerage treatment facilities. Under that grant program,

EPA is authorized to make grants to any state, municipal, inter-state or inter-municipal agency for the planning, design and construction of waste-water treatment facilities and waste-water collection systems. Clean Water Act §§201(g), 212(a), 33 U.S.C. §§ 1281(g), 1291(a). Up to 75% of the total eligible costs of an EPA approved project may be funded by the federal government. Clean Water Act § 202, 33 U.S.C. § 1282.

EPA's decision to fund the proposed construction of sewerage treatment facilities is accomplished in three distinct steps. Each step involves a separate and independent EPA determination. as to whether a grant of funds should be made. 40 C.F.R. § 35.903(a)(1978). EPA grants are made in Step 1 for use by the grantee in carrying out feasibility studies and other preliminary planning matters. At this stage primary attention is paid to the selection of the best location for the treatment facility. The grantee is also charged with the duty of preliminary examining the environmental impact of the proposed facilities. The grantee (end pg. 4)

(beg. pg. 5)
should prepare a facilities plan developed in accordance with 40 C.F.R.35.917-1, which is then submitted to EPA for approval.

If the EPA approves the facilities plan, a Step 2 grant may be awarded to fund the preparation of construction drawings and specifications necessary for the construction of the approved facility. Finally, a Step 3 grant may be awarded to fund the actual construction of the facility in accordance with the design requirements developed under Steps I and 2. 40 C.F.R. § 35.930-1(a).

Grant funds are allocated among the states in accord with a formula specified by Congress. Clean Water Act §§ 205, 33 U.S.C. § 1285. The state is primarily responsible for determining the amount and timing of federal assistance to each municipality. Generally, no grant assistance may be awarded unless priority for a project has been determined by the state in accordance with a priority system developed by the state and approved by the EPA. 40 C.F.R. § 35.912. DEP is the state agency responsible for performing this function. Although the state plays an important

role in determining the priority of wastewater treatment projects and in reviewing project applications, wastewater treatment projects are primarily planned and carried out at the local level.

In addition to complying with the requirements of the Clean Water Act, the EPA must also comply with the provisions of NEPA. NEPA was passed a decade ago for the stated purpose of encouraging a "productive and enjoyable harmony between man and his environment" and promoting "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man..." 42U.S.C. § 4321. To effect that purposeNEPA commands "all agencies of the Federal Government" to (end Pg. 5)

(beg. pg. 6)

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

The result of this requirement is that federal agencies are to examine each action which they propose to take, and, if they determine that the proposed action is a major federal action which will significantly affect the quality of the human environment, prepare anEIS with respect to the proposed action. It is with this requirement that plaintiff contends defendants have not complied.

The obligation to prepare anEIS is imposed upon all Federal Agencies. Rather than establish a single body with authority to promulgate uniform regulations enforcing this obligation, however, NEPA leaves it to each Federal Agency to formulate its own regulations implementing the Act. The EPA has promulgated such regulations. See 40 C.F.R. § 6.100 et seq.

EPA regulations under NEPA contain both general provisions applicable to all EPA actions, see 40 C.F.R. §§ 6.100-6.402, and (end pg. 6)
(beg. pg. 7)
additional special provisions governing proposed wastewater treatment works construction grants made under the Clean Water Act. 40 C.F.R. § 6.500-6.514. Under these regulations an applicant for a wastewater treatment works construction grant is required to submit an environmental assessment to EPA as part of the facilities plan developed under a Step 1 grant. 40 C.F.R. § 6.512(a). The environmental assessment must include a description of the environmental impacts of the proposed action, a description of steps to minimize any adverse environmental effects, an evaluation of alternatives, a description of the existing and future environment without the proposed project, and supporting documentation. Id. The purpose of the environmental assessment is to ensure that the Step 1 grantee considers the environmental impacts of a proposed action at the earliest possible point in the Step 1 grantee's planning process, as well as to assist the EPA in deciding whether an EIS is required.

40 C.F.R.§ 6.202. In order to insure public participation in the development of the facilities plan, the EPA regulations require a Step 1 grantee to hold at least one public hearing before the grantee finally adopts the proposed facilities plan as the plan to submit to the EPA for approval. 40 C.F.R. §§ 6.512(b)

It is the responsibility of the EPA, however, to determine whether an EIS is required by NEPA. That determination is made during an environmental review conducted either before approval of the facilities plan, or, if an approved facilities plan is not required, before Step 2 and Step 3 grants are awarded. 40 C.F.R. §§ 6.504(a). EPA must study the proposed action, including a review of the environmental assessment prepared by the applicant, to identify and evaluate the probable environmental consequences of both the proposed action and any feasible alternatives. 40 C.F.R. §§ 6.204. (end pg.7)

From this review, EPA determines whether significant impacts are anticipated from the proposed action, whether any feasible alternatives can be adopted or changes can be made in project design to eliminate significant adverse impacts, and

whether an EIS or a Negative Declaration is required. Id.

The criteria for determining whether an EIS should be prepared are set out in regulations. 40 C.F.R. §§ 6.200, 6.510. In part, the criteria aid in determining whether a proposed action will have significant environmental effects.40 C.F.R. § 6.200(a). The special regulations dealing with wastewater treatment facility grants set out additional factors to be considered. 40 C.F.R. § 6.510. Additionally, the regulations mandate the preparation of an EIS when the "environmental impact" of the proposal "is likely to be highly controversial". 40 C.F.R. § 6.200(b).

If EPA determines that an EIS is not required it will issue a Negative Declaration together with an Environmental Impact Appraisal (hereinafter (EIA). The Negative Declaration is a written announcement prepared after EPA's environmental review stating that EPA has determined that an EIS is not required for a proposed project. 40 C.F.R. § 6.102(e). The EIA should support that decision and should briefly describe the proposed action and feasible alternatives, environmental impacts of the proposed action, unavoidable adverse impacts of the proposed action,

the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, steps to minimize harm to the environment, irreversible and irretrievable commitments of resources to implement the action, comments and consultations on the project, and reasons for concluding that the proposed action will not have a significant environmental impact. 40 C.F.R. §§ 6.212 (b)(2). (end pg. 8)

(beg. pg. 9)

The Negative Declaration and EIA are then made available to the public. The public is given fifteen working days to comment on the two documents. No administrative action on the project can be taken by EPA during the public comment period. 40 C.F.R. §§ 6.212. After the fifteen days have expired, EPA reviews and considers the public comments received and, if significant environmental issues have not been raised, the grant award may be made. 40 C.F.R. § 6.108(c).

In the present controversy, EPA determined, after its environmental review, that the construction of the proposed waste-water treatment facilities would

not have a significant impact upon the environment. A Negative Declaration and EIA were therefore issued in lieu of an EIS. Plaintiff challenges EPA's decision not to issue an EIS, primarily on the ground that the proposals will have a significant impact on the environment. Plaintiff would have the Court overturn EPA's determination to the contrary, and require the preparation of an EIS before the proposed grant is made.

II. THIS COURT'S TASK - THE APPROPRIATE STANDARD OF REVIEW

It is important to establish the exact nature of this Court's responsibility before undertaking an exhaustive examination of the administrative record below and the evidence and argument presented at the hearing. I must emphatically state that this Court is not empowered to question EPA's substantive decision to approve these projects and to grant funds for their

(end pg. 9)

(beg.pg.10)

construction. I may not substitute my own judgment as to the desirability of these projects for that of EPA E.g., Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 12 (1976).

NEPA is a procedural statute. It establishes procedures which a Federal Agency must follow when it is considering a course of action. That procedure is designed to insure that the agency takes a hard look at the environmental consequences of its proposed action. I am to be concerned not with the actual environmental impact of these projects but only with whether EPA examined and weighed these impacts when it decided to proceed with these projects. It is plaintiff's burden, therefore, to show that EPA did not give sufficient consideration to these impacts when it chose not to prepare an EIS.

There is, however, a conflict among the circuits, and even among the judges of this District, as to the appropriate standard of review which I must apply. In some circuits, EPA, or any other agency subject to NEPA, is held to the relatively high standard of "reasonableness". E.g., Minnesota Public Interest Research Group v. Butz, 498 F. 2d 1314 (8th Cir.1974) (en banc); Texas Committee on Natural Resources v. Berglund, 573 F. 2d 201 (5th Cir. 1978); City of Davis v. Coleman, 521 F. 2d661(9th Cir. 1975); Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 (10th Cir. 1973)

International Harvester Co. v. Ruckelshaus 478 F. 2d 615 (D.C.Cir.1973). Under this standard plaintiff need only show that EPA's decision was unreasonable to prevail in this action, See Concerned Citizens of Waterford Township,Inc. v. Berglund, Civil No. 77-222 (D.N.J. May 12,1978) (Gerry, D.J.). In other circuits EPA is held to the more lenient "arbitrary and capricious" standard. E.g., Sierra Club v. Froehlke, 534 F. 2d 1289 (9th Cir.

(end pg. 10)

(beg. pg. 11)

1976); Nucleus of Chicago Home Owners Association v. Lynn,524 F. 2d225(7th Cir. 1975(; Hanly v. Kleindienst, 471 F 2d 823 (2d Cir. 1972),cert denied, 412 U.S. 908 (1973); Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650 (E.D. Mich. 1976), aff'd mem., 559 F. 2d 1220 (dth Cir.1977). Under this standard plaintiff has the more difficalt task of showing that EPA's decision was arbitrary and capricious. See Shiffler v. Rumsfield, Civil No. 75-2129 (D.N.J. May4, 1976) (Fisher,D.J.), aff'd sub nom Shiffler v. Schlesinger , 548 F. 2d 96 (3d Cir.1977) (without expressing an opinion on the appropriate standard of review.)

The Court of Appeals for the Third Circuit has not expressed a clear preference for either standard of review. It has raised the issue and declined to decide it numerous times. See, e.g., Shiffler, supra, 548 F 2d at 104, n.5; N.A.A.C.P. v. Medical Center, 584 F. 2d 619, 635 n.19. I therefore will not deviate from my prior decision to apply the arbitrary and capricious standard to review challenged agency actions under NEPA. See also Kleppe, supra, 427 U.S. at 412; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Duquesne Light Co. v. EPA, 522 F. 2d 1186, 1192-93 (3d Cir. 1975). I must therefore review the administrative record upon which EPA based its decision and that it was not arbitrary or capricious.

III. THE RECORD BELOW

State and local authorities in the Warren County-Pequest River locale first began considering the advisability of replacing (end pg. 11)

(beg. pg. 12)
Belvidere's system of individual septic tank sewerage treatment with centralized sewerage collection and treatment facilities in the 1960's. See Town of Belvidere

Master Plan (McCrosky and Reuter, July 1964); Feasibility Report on Regional Sewerage Facilities, Warren County, New Jersey (Elam and Popoff 1968); Administrative Record, Item (hereinafter "A.R.#") 87 at 3. The PRMUA, with the aid of a Step 1 grant from EPA, commissioned the engineering firm of Elam & Popoff, P.A., to prepare a facilities plan which would examine the alternatives and propose the most appropriate wastewater treatment facilities for use in Belvidere's future. Their report, entitled "Wastewater Facilities Plan for the Pequest River Drainage Basin, Warren Co." (hereinafter "Plan"), was issued in September of 1977. See A.R. #92. This report was submitted to EPA for approval in conjunction with the application of the PRMUA and the Town of Belvidere for grant funds to constuct the sewerage facilities at issue here.

The Plan proposed by the applicants was the result of long and careful study. Prior to the issuance of the final plan, a draft of the Plan was issued in May of 1976. A.R.#88. In compliance with EPA regulations. 40 C,F,R, §§ 6.512(b), a public hearing was held after the draft plan was proposed and before the final

Plan was adopted and submitted to EPA for approval. See A.R.# 92, Appendix E. (Transcript of Public Hearing, May 27, 1976). In that same month, defendants' engineers also issued a document entitled "Environmental Assessment for the Proposed Sanitary Sewer Collection System (Belvidere)". A.R.#87. Although not required by EPA regulations, a public hearing was also held with respect to the Environmental Assessment. See A.R.# #88, (end pg. 12)

(beg. pg. 13)

Appendix A. (Transcript of Public Hearing, August 9, 1976). Additional Project and Engineer's Reports were prepared to conform with New Jersey DEP regulations in 1973 and 1974. Those reports were all revised and updated in November, 1976. See A.R. ## 89, 90, 91.

All of these documents were submitted to EPA as part of the grant application. I have not set out their contents in detail because EPA may not rely solely upon them in determining whether a proposal will have significant environmental effects. Rather, EPA is charged with the duty of conducting an independent examination of the project in order to determine the significance of the project's

environmental consequences.

After the grant application was certified to EPA by DEP, EPA commenced its environmental review to determine if an EIS was required. 40 C.F.R. §§ 6.104(c), 6.204. The purpose of that review is to "determine whether significant impacts are anticipated from the proposed action, whether any feasible alternatives can be adopted or changes can be made in project design to eliminate significant adverse impacts, and whether an EIS or a Negative Declaration is required". 40 C.F.R. § 6.204.

Based upon its environmental review of these projects EPA determined that an EIS was not required. A Negative Declaration was issued with respect to each project. See A.R. ## 32,33. A single EIA covering both projects was issued setting forth EPA's analysis and findings. Id. It is that EIA which is the center of much of this controversy. It is an eleven-page document, with attachments, which concludes that the construction would have only a minimal impact by inducement of increased housing primarily around the edge of the already developed area; that the unavoidable adverse (end pg. 13) beg. pg.14)

(beg.pg 14) environmental impacts are primary impacts due to actual construction, the effects of which are short-termed and able to be minimized by construction specifications and control constraints; that land application and wastewater reuse were not acceptable alternatives; and that the construction projects involving surface water discharge will have a long-term beneficial effect on the economy by achieving water quality standards, improving water quality so as to increase the aesthetic and recreational value of the area, and expanding the area's sewer service while eliminating the problems caused by existing septic systems. See 40 C.F.R. §§6.212 (b)(2).

In accordance with 40 C.F.R. §§6.212(a) the Negative Declaration was not, at the time of its issuance, EPA's final decision. Copies of the Negative Declaration were distributed among the public and comments were solicited. A fifteen-day comment period was provided, 40 C.F.R. §§ 6.212(a). Only one comment was received during that period. See A.R. # 34. After the comment period expired, the decision not to prepare an EIS was finalized, and a determination was made to

to grant the applications and fund the projects.

The two construction grants were finally awarded on September 29, 1978. Only after that time was EPA barraged with numerous comments belatedly objecting to the projects. See A.R. ## 38, 41, 44, 48, 70, 71, 72, 75, 76, 77, 78, 80, 81, 82, 83, 86. Although not called for by the regulations, EPA responded to all of these comments. A public meeting was also held to respond to the objections. See A.R. ## 57, 58, 59, 71, and 94 (Transcript of EPA Public Meeting, February 15, 1979). The meeting was not merely between EPA officials and local citizens, butalso in attendance (end pg. 14) (beg, pg. 15)were numerous representatives of the state and local agencies involved in the planning of the projects. That meeting was chaired by Mr. Kenneth Stoller, P.E. the Chief of the New Jersey Water Programs Branch of the DEP. Plaintiff was also in attendance and made known her objections at that time. A subsequent letter, dated March 20, 1979, was sent out to those in attendance. In nineteen pages that letter sought to address the issues raised at the meeting. See A.R. # 71. The applicants thereafter decided to proceed with the project as planned and EPA reaffirmed both its

decision not to prepare an EIS and its decision to grant funds to build the facilities.

IV. PLAINTIFF'S OBJECTIONS TO EPA's DECISION

EPA regulations set forth a long and detailed list of the general criteria to be considered when a decision as to the need for an EIS is to be made. See 40 C.F.R. §§ 6.200(a),6.510. The regulations also set out in some detail the procedure by which that determination is to be made, including the amount of public participation required. See 40 C.F.R. §§ 6.512(b) 6.212(a). Rather than wade through these regulations one by one to determine whether EPA has complied with them all, I will focus upon the specific objecions raised by plaintiff's complaint. Although it is difficult to extract with precison what plaintiff's objections are, I believe that they can accurately be lumped together in four categories. They are:

> (1) EPA's conclusion that these projects are not major federal actions significantly affecting the quality of the human environment is incorrect;
>
> (end pg. 15)
>
> (beg. pg. 16)
> (2) These projects are controversial

and require the preparation of an EIS;

(3) The decision making process was tainted by EPA's failure to consider potential alternatives to these projects; and

(4) The decision making process was tainted by the lack of public participation.

A. Major Federal Actions Significantly Affecting the Quality of the Human Environment.

This Circuit has adopted a dual standard in interpreting the requirements of this phrase. N.A.A.C.P. v. Medical Center Inc., 584 F. 2d at 625-27. An EIS is therefore required if an action is both a major federal action and if it will have significant environmental consequences. The two terms do not have identical meanings.

Plaintiff points to the cost to the federal government of these projects, upward of $4,000,000.00, to bolster her claim that these projects constitute major federal actions. See Concerned Citizens of Buck Hill Falls v. Grant, 388 F. Supp. 394, 398 (M.D.Pa. 1975), vacated and remanded in part on other grounds, 537 F. 2d 29 (3d Cir. 1976). None of the defendants have challenged this contention. I agree with plaintiff and must

conclude that these projects do constitute major federal actions.

Plaintiff also contends that EPA's conclusion that the projects will not significantly affect the environment is not supported by the record. The complaint makes specific references to at least five impacts which plaintiff alleges are significant: (1) reduction in general level of groundwater recharge; (2) air pollution (end pg. 16)

(beg. pg. 17)

from the operation of the treatment plant; (3) damage to private property caused by alignments of the collection system; (4) damage to trout maintenance streams caused by alignments of the collection system; and (5) damage to acquatic biota at site of the treatment plant outfall into the Delaware River.

A review of the administrative record reveals that none of these impacts escaped the attention of EPA. In each case EPA noted the probable existence of the impact, and then determined that the anticipated impact was insignificant.

The EIA, A.R. ## 32, 33 at page 6, recognized that there would be reduction in the general groundwater recharge level.

In a letter distributed subsequent to the public meeting of February 15, 1979, EPA stated specifically that:

> Based upon calculations using the basin area of the Pequest River at Belvidere the amount of recharge lost due to the projects would be .006 million gallons per day per square mile (mgd/sq. ml.). The total recharge to the basin area would be 1.3 mgd/sq. ml.. This value was determined by calculating the total amount of recharge available from precipitation and runoff. As can be seen the amount lost due to the projects is a negligible amount. (A.R. Item 71, p. 17).

It was certainly not unreasonable for EPA to conclude that a groundwater loss of less than five-tenths of one per cent would not be a significant impact upon the environment.

Plaintiff's complaint comes closer to the mark when she points to the contradictory statements contained in the EIA with regard to odors produced by the treatment plant and their impact on Belvidere's residents. At page 3 the EIA admits that odors will be produced at the treatment facility, but concludes that "(s)ince (end pg. 17)
(beg. pg. 18) there are no communities near the plant site, the adverse effects of odors on residents in (sic) non-exist-

ent". At page 4, however, the EIA states that the "(n)oise produced by the sewage treatment plant will affect residential areas to some extent because of the location of homes in the immediate area". And, finally, at page 5, the EIA again refers to odors, this time concluding that "(a)s there are houses adjacent to the treatment plant site (odors) may be a problem in the absence of screening vegetation to reduce wind velocity at the plant site".

Needless to say, this is an indication of sloppy draftsmanship. However, it points out that the problem of odors was given serious consideration and procedures were chosen to mitigate any impact. "(C)areful operation and maintenance practices and the use of chlorine" will minimize odors actually produced." EIA, supra, at 3. A vegetation screen will be constructed to reduce the impact upon the town of odors not eliminated. EPA concluded that the use of these devices would reduce the level of this impact to insignificance.

The EIA also noted that the proposed alignments of the collection system will have an impact on the environment. The primary impacts, however, will occur

during construction and will be largely eliminated when construction is completed. Numerous techniques have been adopted to minimize this impact. The construction easements will be wider than the permanent easements. Vegetation will not be removed outside of the construction easement and the sites will have to be returned to their original condition afterward. Tree tunnelling will be utilized to prevent the destruction of mature trees with diameters of twelve inches or more. See A.R. # 87 at 35-45. (end pg. 18) (beg. pg. 19)

Even after construction additional steps have been taken to minimize the permanent environmental consequences of the alignment. The manhole covers of alignments in the flood plain will be watertight. The alignments have been placed in positions where gravity, rather than pumping stations, can be used to maintain the flow of the sewerage. The net effect of these and other design features of the Facilities Plan rendered these impacts in EPA's eyes, at least, insignificant.

Plaintiff's allegations with regard to alignments crossing a certain trout maintenance stream are also without merit.

She merely argues that the streams will be crossed. No mention is made of how the crossing will affect the environment, or why such impacts are significant. In fact, the state defendants are quick to point out that no evidence has been presented that the stream is in fact a trout maintenance streat.

Finally, plaintiff's reference to the increased river turbulence at the outfall from the treatment plant is to no avail. The EIA notes the increase in turbulence. The Plan lists the figures upon which EPA's determination of insignificance is based.

The Delaware River at Belvidere has an average flow of 7,817 cubic feet per second. The outfall for the treatment plant will add to that amount an additional .77 cubic feet per second. A.R. # 92 at IX-37. Once again there is a sound basis in the record for EPA's conclusion that this is not a significant impact.

---

1. Plaintiff also complained about the fact that 7% of the easements will traverse private property, thereby preventing the construction of swimming pools or buildings with foundations in these areas. Although certainly significant to the individual landowners, I do not believe it unreasonable to conclude that these effects are not significant as that term is employed in NEPA (end pg. 19)

I have not mentioned other averments of plaintiff, made either in her verified complaint, in her brief, or at oral argument, because they have less merit than the five discussed above. In each case an impact has been noted by EPA and EPA has concluded that the impact is not significant. 2/ Their conclusions are based upon a solid foundation of study and investigation. On the basis of the record before me, and the oral argument of all parties at the hearing, and the testimony of witnesses on behalf of plaintiff's case, I am satisfied that the defendants' acts were neither arbitrary nor capricious, nor an abuse of discretion. 3/ The decision therefore must be upheld.

B. Matters of Public Controversy

In addition to requiring an EIA for every major federal action significantly affecting the quality of the human environment, EPA also requires the preparation of an EIS "when the environmental impact of a proposed EPA action is likely to be highly controversial". 40 C.F.R. § 6.200(b). Plaintiff invokes this rule because of the controversial nature of the project and the great public outcry against it.

2. At oral argument plaintiff referred numerous times to alleged conflicts of interest on the part of an individual who was both mayor of Belvidere, the chairperson of the PRMUA, and a former staff member of former Congresswoman Helen Meyner. Although, if proven, there might be some basis for complaint under state law because of the activities of this state official, see, e.g., N.J.S.A. 40:69A-163, these allegations have no bearing upon the question which I am called upon to decide, whether EPA properly concluded that an EIS was not required.

3. Notwithstanding the fact that I believe the arbitrary and capricious standard to be the appropriate standard of review of EPA-NEPA decisions, see supra at 10-11, I recognize that fairly strong legal arguments can be made for the application of the reasonable standard. I would therefore like to note that, on the basis of the record before me, I would conclude that EPA, based on the record before it, reasonably concluded that the impacts of these projects were not significant.

(end pg. 20)

(beg. pg. 21)

Plaintiff, however, misreads the nature of the rule. The rule comes into play only if the environmental impact of a project, and not the decision to build it, is a subject of controversy. E.g., Rucker v. Willis, 484 F. 2d 158, 162 ((4th Cir. 1973). In this case, all parties seem to agree about the probable nat-

ure of the environmental impacts of the project. The dispute is over whether the impacts are significant. An EIS is therefore not required by 40 C.F.R. § 6.200(b).

C. Consideration of Alternatives

Plaintiff's allegations that the decision was tainted because EPA failed to consider the alternatives is entirely without merit. The briefest examination of the record reveals that it is totally unsupported by the record. See A.R.##87, at 10-12; 29 at Part Vii; 32, 33 at 8-9; 71 at 2-5. More specifically, plaintiff contends that defendants failed to consider what she refers to as the "lagoon" method. Although I cannot pinpoint in the record at what stage EPA first considered tha lagoon alternative, by the time the EPA reaffirmed its decision to make the grant it had clearly addressed plaintiff's preferred alternative. See A.R. # 71 at 12. I must therefore reject plaintiff's arguments that EPA failed to consider appropriate alternative treatment technologies.

D. Public Participation in the Decision Making Process.

Plaintiff has repeatedly asserted that the lack of public participation in the decision making process renders the EPA decision void. She has not, however, set out with any specificity

(end pg. 21)

(beg. pg. 22)

how it was that the public was excluded from the decision making process. A review of the administrative record, See infra at 12-15, shows that the public was given the opportunity to participate and in fact took advantage of that opportunity.

The draft facilities plan was released in May of 1976. A.R. # 87. In accord with 40 C.F.R. §§ 6.512(b), the responsible officials scheduled a public hearing to consider the draft. The hearing was conducted on May 27, 1976. See A.R. # 92, App. E (Transcript of Public Meeting, May 27, 1979). Public Notice of the hearing was given by publication in the "star-Gazette" on April 22, 1976, and in the "Belvidere News" on April 21, 1976. In each case the notice specified the topics to be discussed and indicated when and

where copies of the draft plan could be found. See Ex. F-1, F-2 of Appendix Filed in Support of State Defendant's Motion For Summary Judgment. Additional steps were taken by the defendants to insure adequate public notice, including the sending of letters to the town clerks of all of the involved communities, and to community groups indicating an interest in the matter. See A.R #92, App. E at 43-47.

A separate town meeting was held with respect to the Environmental Assessment. A.R. # 87. That meeting was held on August 9, 1976. See A.R. # 87, App. A (transcript of Public Hearing of August 9, 1976.).

On September 8, 1978, EPA issued the Negative Declarations and EIA's on these projects. Copies were mailed to some forty individuals. See A.R. # 32,33. A fifteen-day comment period was established pursuant to 40 C.F.R. § 6.212(b). Although not required by law, EPA scheduled a public meeting for February 15, 1979. See (end pg. 22) (beg. pg. 23) A.R. # 94(Transcript of Public Meeting, February 15, 1979).

That meeting and the outcome of that meeting have been discussed previously, see supra, pages 14-15, and I will not repeat that discussion here. See A.R. ## 57, 58, 59, 71, 94.

On the basis of this review of the record I do not detect any grievous flaws in the proceedings conducted by the EPA. The public did participate quite vigorously in the decision making process. Aside from her general allegations, plaintiff has pointed to no specific defects to which I may direct my attention. I must therefore conclude that EPA complied with the obligations imposed upon it by its own regulations.

V. CONCLUSION

Since the trial on the merits of this action was advanced and consolidated with the hearing on the application for a preliminary injunction, Fed.R.Civ.P. 65(a)(2), I must determine whether plaintiff has demonstrated her entitlement to the entry of a permanent injunction. Rather, than look to whether plaintiff has demonstrated a reasonable probability that she will succeed on the merits, see Doe v. Colautti, 592 F. 2d 705(3d Cir.,1979)

I must determine whether in fact and law plaintiff has succeeded on the merits of this action. As can be seen from my review of the arguments of plaintiff and the evidence adduced in her behalf, I am satisfied that plaintiff has been unable to sustain her burden of showing that EPA's decision not to prepare an EIS for these projects was arbitrary or capricious. See also Mid-Shiawasee County Concerned Citizens v. Train,

(end pg. 23)

(beg. pg. 24) 408 F. Supp. 650 (E.D.Mich. 1976), aff'd mem. 559 F. 2d 1220 (6th Cir. 1977); Pokorny v. Costle, 464 F. Supp. 1273 (D.Neb.1979); Concerned Citizens of Waterford Township, Inc. v. Berglund, Civil No. 77-2220 (D.N.J. May 13, 1978).

Plaintiff's application for injunctive relief is therefore denied, her complaint dismissed, and judgment will be entered in favor of all defendants. I therefore need not address the numerous other issues raised at the hearing, and all other motions are denied. Judgment shall be entered in accord with this opinion.

APPENDIX C

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Attorneys for the Defendant
Town of Belvidere

MARGARET E. BOSCO

Plaintiff

v.

ECKARDT C. BECK, as RegionII Administrator, U.S.ENVIRONMENTAL PROTECTION AGENCY,DOUGLAS COSTLE, Administrator,U.S.ENVIRONMENTAL PROTECTION AGENCY, DANIAL O'HEARN, Commissioner N.J. DEPARTMENT OF ENVIRONMENTAL PROTECTION,PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY(WARREN COUNTY), and TOWN OF BELVIDERE

Defendants

United States District Court For the District of New Jersey

Civil Action No. 79-1865

AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF WARREN) SS

IRENE M. SMITH, of full age, being duly sworn upon her oath, according to law deposes and says:

1. I reside at 628 Third Street in the Town of Belvidere, New Jersey.

2. I have been a life-long resident of this community.

3. In January, 1974 I was appointed by then Congresswoman Helen Meyner to serve as her Staff Aide for Warren County, New Jersey.

4. In carrying out my duties as Staff Aide, I established an office in my home in the town of Belvidere and maintained a telephone answering service 24 hours per day. The fact that I was Congresswoman Meyner's Staff Aide was a matter of public knowledge and the telephone number was listed in the telephone directory.

5. I served as Staff Aide until mid January, 1979 at which time I completed my term following Congresswoman Meyner's defeat in the general election held in November, 1978.

6. In the summer of 1976 I was asked if I would serve as a member of PRMUA and I accepted. On August 2, 1976 I was appointed by the Board of Chosen Freeholders of the County of Warren to serve as a member of the PRMUA.

7. Following my appointment I asked for and received copies of the minutes and reports for the prior seven(7) years PRMUA had been in existence.

8. I read all of the minutes and reports of the previous meetings and on my own initiative visited sewerage plants and facilities in Newark, Delaware, Maryland, Virginia, Cleveland, Ohio, Woodbridge-Raritan, New Jersey and Flemington, New Jersey. Additionally, I conferred with officials and representatives of the facilities and the government who were familiar with the installations to obtain in-depth information concerning the problems associated with sewerage treatment and related matters.

9. Upon my assumption of the position of a member of the PRMUA I endeavored to determine why the project sould not get off "dead-center".

10. In an effort to have the several government agencies who had the responsibility to determine whether or not the project was feasible and necessary, make a decision, be it for or against the project, I contacted many elected government officials.

11. In the fall of 1976, I ran for an unexpired term on the Town Council of the town of Belvidere and was elected.

12. At the annual meeting of the PRMUA in January, 1977, I was elected Chairperson of the PRMUA.

13. In my new capacity as an elected official of the town of Belvidere and as the Chairperson of the PRMUA, I continued to inquire of government officials as to the status of the project.

14. In December, 1976, I testified at a public meeting in Trenton, New Jersey before the State Department of Environmental Protection advocating the approval of the sewer project.

15. In March, 1977, I contacted Douglas Herbst of the United States Environmental Protection Agency and requested that he come to Belvidere, New Jersey and personally inspect the area. A meeting was held at the County Court House, Belvidere, New Jersey and the communities of Belvidere and Oxford, New Jersey were toured. The proposed site was the same then as it is now and has always been the same.

16. In May of 1977 when no action had been taken by the Governmental Agencies concerning this project, I again contacted

Douglas Herbst and he again inspected the area and in particular the area behind the Blair Apartments is Belvidere, New Jersey.

17. In July, 1977 when no official action had been taken by either the U.S. Government or the State of New Jersey, I hand delivered a letter to Henry Luther, Esq. , Chief of Staff of Governor Brendan Byrne and requested the Governor and his Commissioner of Department of Environmental Protection, David Bardin to get the program off "dead center".

18. In August, 1977 I took a similar letter to the Honorable Walter Mondale, Vice President of the United States of America requesting the Environmental Protection Agency to make a decision be it "yes" or "no" but to make a decision.

19. When Congresswoman Meyner was still in office, I went to her office in Morristown, New Jersey and briefed her Aide on the details of the project.

20. In the fall of 1977 I was elected Mayor of the town of Belvidere and upon assuming the duties of that office in January, 1978, I continued to appeal to the Federal and State Officials to make a "decision".

21. In February, 1978 I was re-elected Chairperson of the PRMUA.

22. In October, 1978, I received word that a decision had at last been made to approve the project and the Town of Belvidere was to receive a grant for the construction of its treatment plant and for the construction of the collection system.

23. At all times when I contacted government officials, elected or appointed, Federal and State, I always asked that they

make a decision. While I was in favor of the project I was more concerned that a "decision" be mede as contrasted to what it would be. The action I took was proper, responsible and necessary in my capacity as an elected official of the Town of Belvidere and Chairperson of the PRMUA.

24. In the Memorandum of Law filed by the Plaintiff, Margaret Bosco in this cause in support of her Motion for Injunctive Relief, the following statement is made:

> The occasion of "conflict of interest" is strongly suggested by financial sponsorship of the Irene Smith Radio Program by Underhill Associates, financial advisors to both PRMUA and town of Belvidere, in matters pertaining to Bond Anticipation Notes and related financial matters of the projects. This benefit in addition to a position held with the newly developed program of the Department of Travel and Tourism (for the State of New Jersey) gives the appearance of a flagrant violation of EPA regulations 25.7, Advisory Groups, in FR final regulations, Part V.

25. In the summer of 1978 I was asked to take over the radio program then being emceed by Charles Haytaian as he had become a candidate for elected office and could not continue in that capacity due to Federal Communications Commission Regulations.

26. From the summer of 1978 to November 1978, I conducted a talk interview type program on Radio Station WRNJ in Hackettstown, New Jersey. I did not receive any remuneration for that position.

27. In January 1979 I was asked by the Manager of WRNJ if I would again manage the talk interview type program on their station, and I accepted in the Spring of 1979.

28. The Financial Advisor of the PRMUA and the town of Belvidere in the years 1977, 1978 and 1979 was Underhill Associates and the accounts were handled by Jerome Burke.

29. Mr. Burke upon his hearing I was going to have a radio program stated to me that he was interested in advertising it in the Warren County area and wanted to know if his company could be a co-sponsor of my program. I informed him he should contact the station concerning same.

30. For a period of 13 weeks Underhill Associates did in fact advertise on my program and paid WRNJ the total sum of $325.00 for the advertising time. I, in accordance with my employment terms with the radio station, received a remuneration in the total sum of $130.00 for the 13 weeks Underhill Associates advertised on the radio program.

31. It should be noted that in addition to Underhill Associates being one of the sponsors of my program, the following also sponsored the program for that 13 week period, Bowers, Schumann & Welsh, Johanna Farms, Mountain Lake Casino, Lanark Inn, L'Boutique, County Cousins, North Warren Farm and Home Supply and New Jersey Lottery Commission.

32. At no time have I receive any money, financial or other benefits as a result of my services as Chairperson of the PRMUA, Councilman, Mayor or member of the PRMUA. Nor did I ever solicit the same or have it offered to me.

33. Recently I have been employed by the New Jersey Department of Travel and Tourism. This is not a newly developed agency as asserted by the Plaintiff but has been in existence for many years.

34. I did not receive the position with Travel and Tourism as a result of any favor, partronage or reward for my efforts in having the Belvidere and Oxford sewer projects approved but rather because of my wide knowledge of New Jersey History and Geography as well as my my genuine interest in seeing the benefits of New Jersey promoted to tourists from outside the "Garden State".

35. In recent years there have been numerous cases of septic system problems and failures developing within the Town of Belvidere. Because of this long standing problem and the efforts undertaken by the elected officials of the town of Belvidere and the PRMUA, the Warren County Board of Health did not mandate the problems be corrected as the construction of the proposed sewerage system would completely solve and eliminate the problem Additionally, due to the frequency of the required cleaning and repairing of septic systems within the town of Belvidere, the Warren County Board of Health informed me that citizens of the town of Belvidere would not be required to obtain a permit to have their septic system cleaned or repaired in as much as the sewer project had been approved.

36. Senior citizens, contrary to what the Plaintiff alleges in Paragraph 6g of her Complaint, will not suffer financial hardship due to the required sewer hook up cost of individual residences. In seeking to have the sewer project approved, the town of Belvidere was successful

in having a grant in the total sum of $45,000.00 made available to senior citizens of the town of Belvidere (55 years or older) to assist them in defraying the cost of hook up expenses. The maximum grant for each senior citizen is $1,500.00.

37. I have known the Plaintiff personally for many, many years and state that at no time relavent was any information concerning the sewer project in question withheld from the public in general and Plaintiff in particular. At all times the town of Belvidere, PRMUA and the other government agencies have fully and completely cooperated with the public in making information available as to the nature and size of the system. In fact, additional public meetings were held when same were not required by government regulations or laws in order for all citizens to be apprised of the project and to request information from the representatives responsible for its implementation.

38. This Affidavit is made in opposition to the Motion for Injunctive Relief that has been filed by the Plaintiff, Margaret Bosco in this case.

Irene Smith

Dated August 3, 1979.

Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1643

MARGARET E. BOSCO,

Petitioner,

vs.

ECKARDT C. BECK, Region II Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS COSTLE, as Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; JERRY F. ENGLISH, as Commissioner, N. J. DEPARTMENT OF ENVIRONMENTAL PROTECTION; PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) and TOWN OF BELVIDERE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT JERRY F. ENGLISH, COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION

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ECKARDT C. BECK, Region II Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS COSTLE, as Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; JERRY F. ENGLISH, as Commissioner, N. J. DEPARTMENT OF ENVIORNMENTAL PROTECTION; PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) and TOWN OF BELVIDERE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT JERRY F. ENGLISH, COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION

Counter-Statement of Issues Presented

Should the Petition for Writ of Certiorari be granted where the District Court and the Court of Appeals both upheld the determination of the Environmental Protection Agency that no Environmental Impact Statement was necessary for the approval of a grant for sewerage collection and treatment facilities where the decisions below comport with existing federal law and raise no significant issues of law or fact?

Counter-Statement of the Case

This is an action brought by petitioner Margaret E. Bosco pursuant to the National Environmental Policy Act of 1969 (hereinafter "NEPA"), 42 U.S.C. §4321 *et seq.*, seeking injunctive relief restraining respondents from building sewerage collection and treatment facilities in and around Belvidere, New Jersey, without the preparation of a complete Environmental Impact Statement (hereinafter "EIS"). Petitioner contends that NEPA requires the filing of an EIS, 42 U.S.C. §4332(2)(c), because the construction of the sewerage facilities is a major federal action significantly affecting the quality of the human environment.

The Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, establishes the EPA grant program for the construction of publicly owned sewerage treatment works and forms the statutory basis for construction of the sewerage treatment plant and collection system at issue in this litigation. 33 U.S.C. §1291(1) and (2). This statute authorizes EPA to make grants to any state, municipality or intermunicipal or interstate agency for the planning, design and construction of wastewater treatment facilities

and collection systems and to provide up to 75% of the eligible costs of construction. The State of New Jersey, through the New Jersey Clean Waters Bond Act of 1976, has agreed to provide 8% of the funding for the present projects.

Current EPA regulations require an applicant for a wastewater treatment works construction grant to submit an environmental assessment with the facilities plan developed under a Step 1 grant. 40 C.F.R. §6.512(a). This environmental assessment must include a description of the environmental impacts of the project, a description of the steps taken to minimize any adverse environmental effects, an evaluation of feasible alternatives, a description of the existing and future environment without the project and documentation of these findings. 40 C.F.R. §6.512(a). The EPA then reviews this environmental assessment and determines whether significant environmental impacts are expected from the proposed action, whether feasible alternatives can be adopted or changes made in project design to eliminate adverse impacts and whether an EIS or a Negative Declaration is to be filed. 40 C.F.R. §6.204.

If EPA determines, as it did in the present action, that the proposed sewerage collection and treatment facilities will not have a significant impact upon the environment, it issues a Negative Declaration together with an Environmental Impact Appraisal. The Negative Declaration is a written announcement prepared after EPA's environmental review stating that the EPA has determined that an EIS is not required for the proposed project. 40 C.F.R. §6.102(e). The Environmental Impact Appraisal (hereinafter "EIA") is prepared concurrently with the Negative Declaration and briefly describes the proposed action and feasible alternatives, environmental impacts of the

project, unavoidable adverse impacts of the action, the relationship between the short-term uses of man's environment and the maintenance and enhancement of long-term productivity, steps to minimize harm to the environment, irreversible and irretrievable commitments of resources necessary to implement the action, comments and consultation to the project and reasons for concluding that the proposed action will not have a significant environmental impact. 40 C.F.R. §6.212(b)(2).

The Warren County-Pequest River Sewerage Authority submitted to the DEP in 1975 its proposed plan of study of the region's wastewater management options. The DEP approved and certified this planning application in April, 1975 and the EPA approved the Authority's application for a Step I grant for the preparation of the Facilities Plan in July, 1975.

The full Wastewater Facilities Plan for the Pequest River Drainage Basin was issued preliminarily to EPA, DEP, the Authority and to the general public for comment in May, 1976. This Plan provides a comprehensive discussion and analysis of engineering and environmental concerns relating to wastewater treatment in the Pequest River drainage basin area and it develops and evaluates possible alternatives to its proposals. The Facilities Plan concludes that two regional facilities—one in Oxford Township and the other in White Township and serving the Town of Belvidere directly adjacent to this facility —would provide the most environmentally sound and cost effective method of sewerage treatment.

A public hearing was held concerning the Facilities Plan in May, 1976 pursuant to EPA regulations for compliance with NEPA in the Title II Wastewater Treatment Works Construction Grants Program, 40 C.F.R. §6.500 *et seq.*, and a subsequent hearing concerning only the Belvidere

collection system was held in August, 1976. The only questions raised at the initial hearing concerned the claim that some of the public did not have adequate time in which to read the Facilities Plan; the Authority fully responded to written questions posed by interested persons subsequent to the second hearing.

The EPA issued its Negative Declaration and Environmental Impact Appraisal for the Belvidere treatment plant and collection system on September 8, 1978. It is this decision by the EPA which petitioner challenges; the Oxford project is not at issue in the present lawsuit.

No comments or objections were submitted to the EPA for the consideration within fifteen (15) day comment period provided upon the issuance of the Negative Declaration and therefore no further hearing was required. An additional public meeting, not required by law, was held by the EPA in February, 1979, subsequent to which the EPA upheld its determination of a Negative Declaration in a nineteen (19) page letter sent to all interested parties.

On June 12, 1979 petitioner filed a complaint in the United States District Court for the District of New Jersey challenging EPA's issuance of a Negative Declaration and on June 22, 1979 she filed a motion for preliminary injunction. On the return date of August 21, 1979 the Honorable Clarkson S. Fisher, U.S.D.J., with the consent of all parties, ordered the trial of this action on the merits to be advanced and consolidated with petitioner's injunction application. Judge Fisher's Order and Judgment in this matter was filed August 30, 1979 denying petitioner's application for injunctive relief and dismissing her complaint. In his opinion, filed simultaneously, Judge Fisher determined that petitioner had failed to demonstrate that EPA's decision to file a Negative

Declaration and an Environmental Impact Appraisal was either arbitrary and capricious or unreasonable (Pet. App. 35-72). The Third Circuit affirmed the decision of the District Court without opinion on January 18, 1980 (Pet. App. 34).

The Town of Belvidere commenced construction of the collection system portion of this project on October 15, 1979.

ARGUMENT

The Supreme Court should deny the petition for writ of certiorari because the District Court's decision that the determination of the Environmental Protection Agency to issue a Negative Declaration and Environmental Impact Appraisal was neither arbitrary and capricious nor unreasonable presents no undecided legal issues nor factual disputes not correctly decided below and because the particular facts contained in this record have no larger significance beyond this case.

This case presents no undecided legal issues nor any factual disputes which were not correctly and conclusively decided by the District Court and affirmed without opinion by the Third Circuit. Petitioner's assertions of error in the lower courts are plainly incorrect but, even assuming them to be true, the decision in this case turns solely upon the particular facts contained in this record and has virtually no greater importance beyond this case.

The initial Question Presented by the petitioner, whether the decision of the District Court is in error because it applies the "arbitrary and capricious" standard of review instead of a "reasonableness" test to its review of the EPA's decision to issue a Negative Declaration, is

not raised by the decision below. The District Court reviewed the determination of the EPA not to issue an EIS under the "arbitrary and capricious" standard (Pet. 53) but it also explicitly examined EPA's decision under the more rigorous "reasonableness" test as well (Pet. App. 67). While petitioner correctly asserts that there may be some difference among the United States Circuit Courts as to which of the foregoing standards of review is to be applied under NEPA in reviewing the activities of federal agencies, compare, e. g. *Minnesota Public Interest Research Group* v. *Butz,* 498 F. 2d 1314 (8th Cir. 1974) (en banc) and *Sierra Club* v. *Froehlke,* 534 F. 2d 1289 (9th Cir. 1976), the District Court's finding that the Environmental Impact Assessment issued by the EPA passes muster under both standards of review eliminates all ambiguity and potential question of law and necessarily removes this issue as a basis for granting the petition for certiorari.

The third and fourth Questions Presented by the petition for certiorari concern allegations of conflict of interest, undue pressure and political intervention associated with the sewerage treatment works. The record is totally devoid of any evidence beyond petitioner's unsubstantiated assertions at oral argument before the District Court that there is any conflict of interest whatsoever on the part of any individual which in any way affects the decision of the EPA to proceed with the funding and construction of this project. The District Court correctly found that petitioner's allegations were unsubstantiated by facts and, moreover, that they are irrelevant to the question presented to the Court (Pet. App. 67).

Petitioner's assertion as stated in her second Question Presented, that the District Court's determination to uphold

the EPA decision to issue an Environmental Impact Assessment is not supported by the evidence, finds no support in the record and is plainly insufficient to warrant the granting of this petition. The record in this case clearly reveals that EPA has closely examined the proposed sewerage collection and treatment facilities and has found that they will not result in significant environmental impacts. The EIA prepared by EPA and submitted with the Negative Declaration specifically determined that the installation of the sewerage system will not contravene either state or federal air quality standards, that noise levels due to actual operation of the system will not be significant and will be contained within the isolated area of the pumping station, that the construction of the pumping station will have minimum impacts upon the natural resources of the area and that the project will not impact upon any critical areas. The EIA discusses five alternatives to the present project before concluding that the present plans are most acceptable, it indicates that eleven separate steps to minimize the impact upon the environment will be taken during construction and its states that all affected areas will be restored to a condition at least comparable to what existed prior to construction. The record demonstrates that each of the five (5) environmental impacts alleged by petitioner in the District Court to be "significant" and thus to necessitate the filing of a full EIS, see 42 U.S.C. §4332(2)(c), including reduction in groundwater recharge, alignment of the collection system, disruption of the Pophandusing Brook and increased river turbulence at the treatment plant outfall, was found by the EPA and upheld by the District Court to be insignificant and in fact contradicted by the express findings of the Environmental Impact Assessment.

The one specific error of the District Court alleged in the petition for certiorari, that the District Court's conclusion that a single internal contradiction in the environmental impact assessment concerning the impact of odors produced by the proposed treatment plant is attributable to "sloppy draftsmanship" and not an error of fact (Pet. 21-22), is manifestly unsupported in the record. The District Court found on this issue that EPA had given "serious consideration" to the odor problem and that the use of certain devices would render this impact "insignificant" (Pet. App. 63).

Because the factual issues presented by the record were all decided correctly below and, in any event, have no importance beyond the present case, and because this case presents no undecided legal issues, there is no basis for the granting of the petition for writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1643

MARGARET E. BOSCO,

Petitioner,

vs.

ECKARDT C. BECK, Region II Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS COSTLE, as Administrator, U. S. ENVIRONMENTAL PROTECTION AGENCY; JERRY F. ENGLISH, as Commissioner, N. J. DEPARTMENT OF ENVIRONMENTAL PROTECTION; PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) and TOWN OF BELVIDERE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TOWN OF BELVIDERE AND PEQUEST RIVER MUNICIPAL UTILITIES AUTHORITY (WARREN COUNTY) IN OPPOSITION

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COUNTER-STATEMENT OF ISSUES PRESENTED

Should the Petition for Writ of Certiorari be granted when the District Court and the Court of Appeals have determined that the decision of the Environmental Protection Agency not to require an Environmental Impact Statement was proper and that such decision was reached independently by the Agency without any undue or improper influence by any local public officials?

COUNTER-STATEMENT OF THE CASE

The Respondents, Town of Belvidere and Pequest River Municipal Utilities Authority (Warren County), adopt and incorporate herein by reference, the facts as set forth in the Brief of Respondent, New Jersey Department of Environmental Protection filed in opposition to the Petition for Writ of Certiorari.

In addition thereto, they state that Irene M. Smith, who is Mayor of the Town of Belvidere, is a life-long resident of that community. For a period of five years, commencing January 1974, she served as a staff aide to then Congresswoman Helen Meyner.

In August 1976, Mrs. Smith was appointed to the Pequest River Municipal Utilities Authority (hereinafter PRMUA). Upon taking office she made a complete review of all the minutes and reports of PRMUA for its prior seven years of existence, and in addition thereto made physical inspections of various wastewater treatment facilities located in adjoining states as well as within the State of New Jersey. This independent research enabled her to

become familiar with the numerous problems related to wastewater disposal and the various methods used for its treatment.

In 1976, Mrs. Smith was elected to the Town Council of Belvidere, and in January of 1977, elected Chairperson of PRMUA. Thereafter, she made constant inquiries, written and oral, of the appropriate Federal and State agencies to determine why the Town of Belvidere sewer project was not getting off "dead center" and requested the agencies to make a decision, either for or against the project. In contacting the elected and appointed officials, ranging from the Vice-President of the United States of America to Aides of Congressmen and employees of EPA, Mrs. Smith always did so in her capacity as an elected and appointed local public official.

ARGUMENT

The Supreme Court should deny the Petition for Writ of Certiorari since the actions of any local officials were not in violation of any statute or ethical code of the United States, or of the State of New Jersey and did not improperly influence the decision of the Environmental Protection Agency.

The Petitioner, Margaret Bosco, both at the trial level in the District Court and before the Third Circuit Court, contended that the Mayor of the Town of Belvidere, Irene M. Smith, had violated the provisions of 18 U.S.C. § 201. Neither Court, however, found any merit to this unwarranted assertion. Now, for the first time in this matter, the Petitioner seeks to establish a new basis for attacking the integrity and actions of Mayor Smith by alleging the Mayor violated the Standards of Ethical Conduct for

Government Officers and Employees, 30 C.F.R. 6469 (1965), which standards were enacted fourteen years prior to the filing of the initial Complaint by Petitioner in this cause.

It is contended by the Respondents, Town of Belvidere and PRUMA, that the third Question Presented in the Peitioner's Brief is not properly before this Court, as the same was never considered by the trial and appellate courts below. While these malevolent claims lack proper appellate foundation for consideration, they must be challenged when they are submitted to the highest Court of the land for resolution.

The actions taken by Mayor Smith as documented in her Affidavit (Pet. App. C.) reveal she did not in any manner seek to impede the efficiency or economy of the government, nor did her efforts to resolve the problem affect the complete independence and impartiality of the Environmental Protection Agency's (hereinafter EPA) approval of the project without requiring an Environmental Impact Statement. The ultimate decision by the EPA was made totally within official channels and has been affirmed on its merits in the District Court. Moreover, the action by the Mayor cannot be deemed to have adversely affected the confidence of the public in the integrity of the Government. To the contrary, her efforts can only serve to reaffirm the faith our citizens have in our representative form of government.

While the Petitioner correctly quoted from the opinion of the trial judge, who stated:

> At oral argument plaintiff referred numerous times to <u>alleged</u> conflicts of

> interest on the part of an individual who was both mayor of Belvidere, the chairperson of the PRUMA, and a former staff member of former Congresswoman Helen Meyner. Although, if proven, there might be some basis for complaint under state law because of the activities of this state official, see, e.g., N.J.S.A. 40:69A-163, these allegations have no bearing upon the question which I am called upon to decide, whether EPA properly concluded that an EIS was not required. (Pet. App. p. 67) (Emphasis Added)

Her continued reliance on this language, as evidenced in her Appellate Brief and the Petition now before this court, demonstrates her total misconception of the conclusion reached therein; that is, even if Mayor Smith did violate N.J.S.A. 40:69A-163, which violation is expressly denied, it would have no bearing upon the EPA's ultimate determination that an Environmental Impact Statement was not required.

The state statute to which the trial judge's observation refers provides:

> Interest in contracts or jobs forbidden
>
> No officer or employee elected or appointed in any municipality shall be interested directly or indirectly in any contract or job for work materials, or the profits thereof, to be furnished or performed for the municipality, and no such officer or employee shall be interested directly or

> indirectly in any contract or job for work or materials or the profits thereof, to be furnished or performed, for any person operating any interurban railway, street railway, gas works, waterworks, electric light or power plant, heating plant, telegraph line, telephone exchange, or other public utility within the territorial limits of such municipality. N.J.S.A.40:69A-163.

The record in the case at bar, is totally barren of any competent evidence which would establish or imply that Mrs. Smith, personally, had any interest, directly or indirectly, in any contract or job for work, materials or the profits thereof with respect to the construction of the Belvidere wastewater collection and treatment project. The Mayor's only interest is shared by the overwhelming majority of the Town's residents and elected officials - the desire to see the sanitary wastewater problem which presently exists in the community eliminated.

In her official position as Mayor, it was Mrs. Smith's duty and obligation to support and protect the Town of Belvidere's vital interest in the construction of a sanitary wastewater system, and she has consistently done so in an ethical and legal manner.

The Petitioner did not refer to other local officials in the Complaint she filed in this cause, nor did she make mention of them in her brief in support of motion for preliminary injunction or at the trial in the District Court. However, she now seeks to attack the integrity of the Warren County Prosecutor, a former Councilman, Chairman of the Belvidere Planning Board

and the project engineer through malicious allegations which are totally unsupported by any reference to competent evidence or citation of law. Mrs. Bosco does not even dignify her baseless claims by indicating how any of these individuals influenced the decision of the EPA to issue a Negative Declaration and Environmental Impact Statement.

These outrageous and libelous statements which the Petitioner has directed against dedicated public servants have no place in a court of law and do not deserve any consideration in resolving the issue before this Court.

For the foregoing reasons, as well as those expressed in the Briefs filed and to be filed on behalf of Respondents Beck, Costle and English, which are hereby adopted, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 79-1643

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARGARET E. BOSCO, PETITIONER

v.

ECKARDT C. BECK, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals affirmed the decision of the district court without opinion (Pet. App. 34). The opinion of the district court (Pet. App. 37-72) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34) was entered on January 18, 1980. A petition for a writ of certiorari was filed on April 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Environmental Protection Agency properly concluded that an environmental impact statement was not required in connection with federal funding of a sewerage collection and treatment project.

STATUTE INVOLVED

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), is reproduced in the opinion of the district court (Pet. App. 44-45).

STATEMENT

The Clean Water Act, 33 U.S.C. 1251 *et seq.*, established a program under which EPA may make grants to a state, municipality, interstate agency or inter-municipal agency for the construction of publicly-owned wastewater treatment works. 33 U.S.C. 1281(g). Under this program, EPA is funding 75% of the construction costs of such a project for Belvidere, New Jersey. See 33 U.S.C. 1282; see also 40 C.F.R. 35.900 *et seq.* (1978). EPA determined that since the project did not have a significant effect on the environment, no EIS was required.[1] On September 8, 1978, EPA issued "negative declarations" and an Environmental Impact Appraisal (EIA) in support of this decision, as required by its regulations (A.R. 32, 33)[2]. The EIA addressed the environmental aspects of the project as required by 40 C.F.R. 6.212(b)(2)(i). Following issuance of the negative declarations and EIA, public comments were solicited. No significant environmental issues were raised during the comment period. EPA awarded the construction grants on September 29, 1978. Construction of the project began on October 15, 1979, and continues at this time.

On June 13, 1979, petitioner sued the federal and state respondents, alleging essentially that an EIS was required in connection with the sewerage collection and treatment

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[1]See 40 C.F.R. Part 6, Subpart E (1978) for EPA regulations implementing NEPA in connection with wastewater treatment works construction grants. New regulations appear at 44 Fed. Reg. 64174 (1979).

[2]"A.R." refers to the administrative record.

project and seeking to enjoin the construction of the project until an EIS was filed under 42 U.S.C. 4332(2)(C). Following trial, the district court denied injunctive relief and dismissed the complaint on August 30, 1979 (Pet. App. 35-36). The district court held that EPA's decision not to prepare an EIS was justified because there were no significant environmental impacts associated with the sewerage project. The court of appeals affirmed without opinion (Pet. App. 34).

ARGUMENT

The decision below is correct, does not conflict with the decision of any other circuit, and does not raise any important questions warranting this Court's review.

The district court, in a considered opinion (Pet. App. 37-72), correctly held that EPA had assessed the environmental impacts of the proposed sewerage project, and had justifiably concluded that the consequences were too insignificant to require an EIS. The EIA assessed the effects of the project on air quality, noise levels, natural resources, social and economic factors, water quality, and other aspects of the environment (A.R. 32, 33 at 1-6).[3] Alternatives to the proposed project, with evaluations of each, were also presented (A.R. 33 at 6-9). Steps to minimize harm to the environment during construction were described, including the incorporation into the construction specifications of state Department of Environmental Protection guidelines (*id.* at 9-10). The

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[3]Contrary to petitioner's assertions (Pet. 22), the EIA dealt with the subject of odors at the plant site and reasonably concluded that this was not a significant environmental impact (A.R. 32, 33 at 8). The assessment noted homes are located within 600 feet of the site (A.R. 33 at 8). Odors are to be minimized by careful operation and maintenance practices, the use of chlorine, and screening vegetation to reduce wind velocity (*id.* at 3, 5).

EIA noted that records of a public hearing showed no unanswered questions concerning the project (*id.* at 11). Based on the foregoing, EPA concluded there would be no significant impacts such as would require an EIS (*ibid.*). Petitioner does not point to one significant environmental impact of this project.

Petitioner primarily argues (Pet. 13-19) that the district court incorrectly applied the "arbitrary-and-capricious" standard of review to EPA's decision not to prepare an EIS, rather than the "reasonableness" standard, which petitioner prefers. This issue is illusory because the district court specifically found both standards were met (Pet. App. 67 n.3 (the word "reasonable" in petitioner's reproduction of this footnote should read reasonableness")).

Petitioner simply challenges the wisdom of the project. NEPA, however, does not authorize the courts to substitute their judgment as to the desirability of a particular project. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-168 (Jan. 7, 1980), slip op. 5; *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1279-1280 (9th Cir. 1973); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 786-787 (D.C. Cir. 1971).[4]

---

[4]Petitioner also makes several unclear allegations of conflict of interest, political pressure and the like in connection with the decision to construct the sewerage project (Pet. 23-31). These allegations are irrelevant to petitioner's NEPA claim, and petitioner has failed to provide any factual support for them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1980

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